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Debaroti Das Gupta v Deb Brata Das Gupta

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HIGH COURT (KUALA LUMPUR) — SUMMON NO S22-191 OF 2009
KAMALUDIN MD SAID JC
9 MAY 2014

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Succession — Administrators — Appointment — Appointment of additional administrators — Whether sufficient cause shown — Whether estate fully and properly administered — Failure to render accounts — Probate and Administration Act 1959 s 34

D

Succession — Probate — Contentious probate proceedings — Probate action — Whether includes application for additional administrator to be appointed — Whether mandatory for action to be commenced by writ — Whether action granted — Rules of the High Court 1980 O 72 r 2 — Probate and Administration Act 1959 ss 2 & 34

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The defendant and one Dr Ajoy Kumar (now deceased) had been appointed as the administrators of estate of the deceased, one Latika Das Gupta, vide a grant of probate dated 26 March 1999. After the demise of Dr Ajoy Kumar in September 2002, the defendant was the sole administrator of the estate of the deceased. The plaintiff, who was a beneficiary under the will of the deceased, sought to compel the defendant to fully administer the 'cash and stocks' assets of the deceased. The plaintiff also sought the distribution of shares due to her as beneficiary under the will of the deceased. The plaintiff thus commenced this action seeking the following reliefs: (i) for an investigation to be conducted over the assets of the deceased and for accurate accounts be given to the court; (ii) for the assets in relation to the plaintiff to be administered; and (iii) for an additional administrator to be appointed by the court. The issue arising for determination were: (i) whether the sum of RM340,000 already paid to the plaintiff represented the full and final beneficiary shares which the plaintiff was entitled under the will; (ii) whether the defendant had fully and properly administered the beneficiary shares held under 'cash and stocks' assets of the deceased estate; (iii) whether there was due and proper administration of the estate; and (iv) whether it was necessary to appoint an additional executor given that the administration and distribution of the assets had not been fully and properly carried out. The defendant raised a preliminary issue that the plaintiff had failed to use the proper procedure in bringing his action. The defendant submitted that this suit was in its essence a probate action and since the plaintiff had failed to use the proper procedure in bringing the action, the defendant urged the court to dismiss the action 'in limine'.

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Held, dismissing the plaintiff's action:

(1) The definition of a 'Probate Action' in s 2 of the Probate and Administration Act 1959 ('the Act'), includes an application to alter or revoke any grant of representation. The plaintiff's application for an additional administrator to be appointed, effectively asked the court to alter the grant of representation. The application clearly fell under the definition. Further, the entire pleading in the plaintiff's statement of claim which referred to the deceased estates in the will which had been previously probated as the basis of her claim was a probate cause or matter under the definition. Hence, the plaintiff's application was a probate action and the provisions of O 72 r 2 of the Rules of Court 2012 read together with s 34 of the Act applied (see para 15).

(2) A probate action must be begun by writ, and the writ must be issued out of the Registry as provided under r 2(1). The word 'must' denotes that it is mandatory for the action to be begun by way of a writ action. Accordingly, the action had to be dismissed 'in limine' for having failed to use the proper procedure (see paras 21–22).

(3) The plaintiff had proved on balance of probability that the said sum of RM340,000.00 already paid to her did not represent the full and final sum of her beneficiary shares which she was entitled under the will. The defendant had also failed to fully and/or properly administer the beneficiary shares of the estate under 'cash and stocks' to which the plaintiff was entitled to her due share as beneficiary under the will (see paras 43 & 59).

(4) The defendant had not prepared any periodic accounts in relations to assets defined as 'cash and stocks' to which the plaintiff had a beneficial interest. The defendant had not provided the periodic accounts to the plaintiff; had kept the plaintiff from knowing the status of the assets to which she had a beneficial interest; had disbursed expenses contrary to the will; and had not banked in money received into the estate's account. There was clear evidence that there was lack of due and proper administration of the estate in relation to the assets held under 'cash and stocks' to which the plaintiff had a beneficial interest (see para 77(b) & 101).

(5) The plaintiff had clearly established there was 'sufficient cause' to justify the court's interference to appoint an additional administrator to administer the estate (see para 111).

[Bahasa Malaysia summary

Defendan dan seorang yang bernama Dr Ajoy Kumar (telah meninggal dunia) telah dilantik sebagai pentadbir-pentadbir estet si mati, Latika Das Gupta, melalui pemberian probet bertarikh 26 Mac 1999. Selepas kematian Dr Ajoy

Kumar pada September 2002, defendan merupakan pentadbir tunggal estet si mati. Plaintif, yang merupakan benefisiari di bawah wasiat si mati, memohon untuk memaksa defendan mentadbir aset-aset tunai dan stok si mati secara penuh. Plaintif juga memohon pembahagian bahagian-bahagian terhutang kepadanya sebagai benefisiari di bawah wasiat si mati. Plaintif kemudiannya memulakan tindakan ini memohon relief-relief: siasatan dijalankan ke atas aset-aset si mati dan agar akaun yang tepat diberikan kepada mahkamah; agar aset-aset berkaitan plaintif ditadbir; dan agar pentadbir tambahan dilantik oleh mahkamah. Isu yang timbul bagi pemutusan adalah sama ada jumlah RM340,000 yang telah dibayar oleh plaintif mewakili bahagian-bahagian benefisiari yang mana plaintif berhak di bawah wasiat; (i) sama ada defendan telah mentadbir penuh dan bahagian-bahagian benefisiari yang dipegang di bawah aset-aset tunai dan stok etet si mati; (ii) sama ada terdapat pentadbiran estet yang teratur; dan sama ada perlu untuk melantik pentadbir tambahan memandangkan pentadbiran dan pembahagian aset-aset tidak dijalankan sepenuhnya dan dengan teratur. Defendan membangkitkan bantahan awalan bahawa memandangkan plaintif telah gagal menggunakan prosedur yang sepatutnya dalam membawa tindakan tersebut, defendan menggesa mahkamah untuk menolak tindakan tersebut 'in limine'.

Diputuskan, menolak tindakan plaintif:

(1) Definisi tindakan probet di bawah s 2 Akta Probet dan Pentadbiran 1959 ('Akta'), termasuklah satu permohonan untuk menukar atau membatalkan apa-apa pemberian representasi. Permohonan plaintif bagi pentadbir tambahan, secara efektifnya memohon mahkamah untuk menukar pemberian representasi. Permohonan jelas terjumlah di bawah definisi. Seterusnya, keseluruhan pliding dalam penyataan tuntutan plaintif yang merujuk kepada estet-estet si mati dalam wasiat yang mana telah diprobetkan terdahulu sebagai asas tuntutan adalah kausa atau perkara probet di bawah definisi. Oleh itu, permohonan plaintif adalah tindakan probet dan peruntukan-peruntukan A 72 k 3 Kaedah-Kaedah Mahkamah 2012 dibaca bersama-sama dengan s 34 Akta terpakai (lihat perenggan 15).

(2) Tindakan probet mestilah dimulakan dengan writ dan writ mestilah dikeluarkan daripada pendaftar seperti yang diperuntukkan di bawah k 2(1). Perkataan 'mesti' menunjukkan bahawa ia adalah mandatori bagi tindakan dimulakan melalui tindakan writ. Sewajarnya, tindakan mestilah ditolak secara 'in limine' kerana gagal menggunakan prosedur yang sepatutnya (lihat perenggan 21–22).

(3) Plaintif telah membuktikan atas imbangan kebarangkalian bahawa jumlah RM340,000 telah dibayar kepadanya tidak mewakili jumlah penuh dan akhir bahagian-bahagian benefisiari yang mana dia berhak di bawah wasiat. Defendan juga gagal untuk mentadbir sepenuhnya atau

dengan betul bahagian-bahagian benefisiari estet di bawah tunai dan stok dalam mana plaintif berhak ke atas bahagiannya yang terhutang sebagai benefisiari di bawah wasiat (lihat perenggan 43 & 59).

(4) Defendan telah menyediakan akaun bertempoh berkenaan aset-aset yang dinyatakan sebagai tunai dan stok yang mana plaintif mempunyai kepentingan benefisial. Defendan tidak memperuntukkan akaun bertempoh kepada plaintif; telah menghalang plaintif daripada mengetahui status aset-aset dalam mana dia mempunyai kepentingan benefisial; telah mengembalikan perbelanjaan bertentangan dengan wasiat; dan tidak memasukkan wang yang diterima dalam akaun estet. Terdapat keterangan nyata bahawa terdapat kekurangan pentadbiran yang sepatutnya dan wajar ke atas estet berkenaan aset-aset yang dipegang di bawah tunai dan stok dalam mana plaintif mempunyai kepentingan benefisial (lihat perenggan 77(b) & 101).

(5) Plaintif telah membuktikan dengan jelas bahawa terdapat kausa yang cukup untuk memberi justifikasi kepada campur tangan mahkamah melantik pentabir tambahan untuk mentadbir estet (lihat perenggan 111).]

Cases referred to

Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors [1998] 4 MLJ 268; [1998] 4 CLJ 81, CA (folld)

Datin Melati bt Abdullah & Ors v Syed Hassan bin Syed Salim (No 2) [1999] MLJU 420; [1999] 4 CLJ 21, HC (refd)

Fong Ah Tai & Ors v Fong Yoon Heng & Anor [2004] 7 MLJ 128, HC (refd)

Gan Chiew Heang & Ors v Universal Trustee (M) Bhd & Anor [2010] MLJU 1286; [2011] 10 CLJ 213, HC (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Ligar Fernandez v Eric Claude Cooke [2002] 5 MLJ 177; [2002] 6 CLJ 152, HC (refd)

Neoh Ah Yan v Ong Leng Choo & Anor [2008] 7 MLJ 151; [2007] 10 CLJ 410, HC (refd)

Sindora Furniture Sdn Bhd & Anot v Top-range Product (M) Sdn Bhd [2010] MLJU 1735; [2010] 1 LNS 881, HC (refd)

Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retmanan [2010] 7 MLJ 355, HC (refd)

Subbiah Sundaravalli Achi v Karuppiah Chettiar & Anor [1968] 1 MLJ 120, HC (refd)

Tan Khay Seng v Tan Kay Choon & Anor [1990] 1 MLJ 51, HC (refd)

Legislation referred to

Official Administrator (Fees) Regulations 1972

Probate and Administration Act 1959 ss 2, 34, 43, 68

A Rules of Court 2012 O 72, O 72 rr 1(2), 2, 2(1), 9, O 80 r 2(3)(e)

James Ling (Ten & Colin) for the plaintiff.
Tengku Harris (Amrit & Co) for the defendants.

B **Kamaludin Md Said JC:**

BACKGROUND OF THE CASE

[1] This is an action arising from the writ action against the defendant to
C fully administer the 'cash and stocks' assets of the deceased Latika Das Gupta, and to distribute to the plaintiff, the beneficiary shares due to her as expressed in the said will.

[2] Latika Das Gupta passed away and left a will dated 6 January 1994. The
D beneficiary of the will includes the plaintiff, the defendant, and children of Deb Datta Das Gupta, Deb Datta Das Gupta, Dr Shipra Nag and Dr Rita Roy Chaudhuri.

[3] The plaintiff is a beneficiary to the will of the deceased Latika Das
E Gupta dated 6 January 1994 and is a beneficiary to 1/8 of the share of the assets held under 'cash and stocks' of the deceased estate.

[4] The defendant and Dr Ajoy Kumar Roy Choudhuri (now deceased)
F were appointed as the administrators of estate of the deceased vide a grant of probate dated 26 March 1999. After the demise of Dr Ajoy Kumar Roy Choudhuri in September 2002, the defendant was the sole administrator of the estate of the deceased.

G **[5]** The 'cash and stocks' assets of the deceased estate were those items listed in item 4, 5, 7 and 8 of List B of assets and liabilities in the probate applications.

PRELIMINARY ISSUE

H *The plaintiff has failed to use the proper procedure in bringing his action*

[6] The defendant raised a preliminary issue that the plaintiff has failed to use the proper procedure in bringing his action. The defendant submitted that from the pleaded case of the plaintiff, this suit is in its essence a 'PROBATE
I ACTION'. A simple interpretation of the plaintiff's statement of claim makes it obvious that one of the principal reliefs sought by the plaintiff is for an additional administrator to be appointed.

[7] The defendant referred to the case of *Neoh Ah Yan v Ong Leng Choo &*

Anor [2008] 7 MLJ 151; [2007] 10 CLJ 410 where the court at p 160 (MLJ); p 417 (CLJ); stated the following:

> This suit is essentially an action for the grant of letters of administration to a person, that is, the plaintiff; *to be joined with the existing co-administrators* to administer the estate of the late Neoh Eng Hong. In other words, it is (to quote r 1(2)) 'an action for the grant of ... letters of administration of the estate, of a deceased person'. *To my mind, it cannot be said that the present action is merely an application to amend the letters of administration. It is more than that* ... (continued)
>
> *The present case is essentially the plaintiff's application to be joined as an administrator with the existing co-administrators for the grant of letters of administration as provided under* O 72 r 1(2) of the RHC. *Therefore,* O 80 r 2(3)(e) of the RHC *is inapplicable.*
>
> *[21] Since issue (a) above is answered in the affirmative, therefore, the present application should have been commenced by way of a writ action, as clearly provided for under O 72 r 2(1) of the RHC. This provisions stipulates: 2.(1) A probate action must be begun by writ, and the writ must be issued out of the Registry.*
>
> *[22] The word 'must' denotes that it is mandatory for the action to be begun by way of a writ action.*
>
> In the Malaysian High Court Practice, at p 2472, at para 72.1.4, it is stated: [72.1.4] Actions for the revocation of grant. An application to revoke grant of probate is by probate action as defined in the Probate and Administration Act 1959 (Act 97) s 2 and RHC O 72 r 1(2), and is to be begun by writ: *Jirgarlal Kantilal Doshi & Anor v Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211 (HC) (a probate action begun by originating motion may be struck out on application by the defendants). (Emphasis added.)

[8] The defendant submitted that therefore, it is clear from the above *Neoh Ah Yan*'s case that there is a proper procedure laid out when initiating a probate action. The procedures have been clearly laid out and failure to abide by such procedures would deem the action to be flawed and has to be dismissed. The facts in the above case can be distinguished with this present case on the point pleaded by the plaintiff to have an additional administrator appointed.

[9] This proposition finds further support if one were to look at the definition of a 'PROBATE ACTION' in s 2 of the Probate and Administration Act 1959, where a probate action is defined as:

> means a cause or matter in which a petition for probate or administration is contested by any person, *and includes an application to alter or revoke any grant of representation* (Emphasis added.)

[10] This in turn would make it mandatory for the plaintiff to pursue an action under O 72 r 2 of the Rules of Court 2012 together with s 34 of the Probate and Administration Act 1959. Order 72 r 2 of the Rules of Court 2012 states the following:

2 Requirements in connection with issue of writ (O. 72 r. 2)

(1) A probate action shall be begun by writ, and the writ shall be issued out of the Registry.

(2) Before a writ beginning a probate action is issued, *it must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased to which the action relates*.

(3) A writ beginning an action for the revocation of the grant of probate of the will, or letters of administration of the estate, of a deceased person shall not be issued *unless a citation under rule 7 has been issued or the probate or letters of administration, as the case may be, has or have been lodged in the Registry*. (Emphasis added.)

[11] It was further submitted that there has been no endorsement done by the plaintiff in pursuing this action. The law under O 72 of the Rules of Court 2012 is clear and there has been a failure on the part of the plaintiff to abide by the procedure laid down. There has been no attempt by the plaintiff to even cure this omission by the plaintiff.

(a) section 34 of the Probate and Administration Act 1959 states the following:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

(b) the relief sought by the plaintiff requires the plaintiff to abide by this section and cannot have such an application made before this court in this suit. It is amply clear from the endorsement that the writ was not filed under O 72 RHC;

(c) the Court of Appeal case of *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81 where at p 272 (MLJ); p 88 (CLJ); the court stated the following:

> It is pertinent at this stage to examine the law on the power of the court to revoke a grant of probate or letters of administration. Section 34 of the Act provides that:
>
> > Any probate or letters of administration may be revoked for sufficient cause.
> >
> > The power to revoke a grant of probate is vested in the High Court and may be exercised if the court is satisfied that there is sufficient cause to do so.

(d) furthermore the court went on to say and adopt the objective test:

> The power to revoke a grant of probate or letter of administration is vested in the High Court by s 34 of the Probate and Administration Act 1959 (Rev 1972) and can be exercised for 'any sufficient cause'. However, there is no definition of what is sufficient cause. But, if in the words of Jeune, President,

in the Goods of William Loveday, *(1) 'the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto' then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In our view, that is a strictly objective test.*

(e) that the objective test required in determining the issues at hand has to be dealt with in a proper probate action to be taken by the plaintiff.

(f) order 72 r 9 of the Rules of Court 2012 where it states the following:

9 Affidavit of testamentary scripts (O 72 r 9)

(1) Unless the Court otherwise directs, the plaintiff and every defendant who has entered an appearance in a probate action must swear an affidavit:

(a) describing any testamentary script of the deceased person, whose estate is the subject of the action, of which he has any knowledge or, if such be the case, stating that he knows of no such script; and

(b) if any such script of which he has knowledge is not in his possession or under his control, giving the name and address of the person in whose possession or under whose control it is or, if such be the case, stating that he does not know the name or address of that person; and any such script which is in the possession or under the control of the deponent must be annexed to his affidavit.

(g) That two key procedures have been failed to be followed by the plaintiff, firstly being an endorsement under O 72 r 2 of the RC 2012 for this probate action in which would not be found in the writ and secondly an affidavit sworn under O 72 r 9 of the RC 2012 in when this suit was initiated.

(h) That the plaintiff has again ignored a laid out procedure when proceeding with a probate action. As submitted earlier, it is the defendant's submission that this is indeed a probate action initiated by the plaintiff. Procedures provided by the Rules of Court 2012 have been ignored and not rectified. This has in turn made it fatal to this suit.

(i) The conclusion is clear and that this being a probate action initiated by the plaintiff, the plaintiff has failed to follow the procedures. It is clear that a probate action and a civil action have its vast differences especially in terms of procedure.

(j) It has been decided by the case of *Neoh Ah Yan v Ong Leng Choo & Anor* [2007] 7 MLJ 151; [2007] 10 CLJ 410 that the provisions of O 72 are mandatory.

[22] The word 'must' denotes that it is mandatory for the action to be begun by way of a writ action. In the Malaysian High Court Practice, at p 2472, at para 72.1.4, it is stated: [72.1.4] Actions for the revocation of grant. An application to revoke grant of probate is by probate action as defined in the Probate and Administration Act 1959 (Act 97) s 2 and RHC O 72 r 1(2), and

A is to be begun by writ: *Jirgarlal Kantilal Doshi & Anor v Damayanti Kantilal Doshi (Executrix) & Anor* [1998] 1 SLR 211 (HC) (a probate action begun by originating motion may be struck out on application by the defendants). (Emphasis added.)

B **[12]** In the circumstances of the plaintiff having failed to use the proper procedure in bringing his action, the defendant urged this court to dismiss the plaintiff's case can 'in limine'.

OPINION OF THE COURT

C

[13] I have read through the plaintiff's pleading and one of the principal reliefs sought by the plaintiff is for an additional administrator to be appointed. The plaintiff's submitted that this action is a civil action against defendant to fully administer the 'cash and stocks' assets of the deceased estate and thus the D suit is not a contentious probate proceedings as defined under O 72 r 1(2) of the Rules of Court 2012. As such there is no requirement for the plaintiff to commence this proceeding by way of O 72 r 2 of the Rules of Court 2012. In the circumstances, there is no issue of plaintiff having failed to abide by the E procedure laid down under O 72 r 2 of the Rules of Court 2012. The O 72 r 1(2) of the Rules of Court 2012 states as follows:

In these rules, 'probate action' means an action for the grant of probate of the Will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged F Will, not being an action which is non-contentions.

[14] In this present action before this court, the plaintiff submitted that plaintiff is not arguing the issue of the grant of probate, or to dispute the validity of the will and it is not an action to revoke the grant of probate which G was granted and issued by the High Court at Kuala Lumpur on 27 March 1999.

[15] In my opinion, if one were to look at the definition of a 'PROBATE H ACTION' in s 2 of the Probate and Administration Act 1959, which *includes an application to alter or revoke any grant of representation*, the application by the plaintiff for an additional administrator to be appointed, effectively asking the court to alter the grant of representation. The application is clearly falls under the definition. Further, the entire pleading in the plaintiff's statement of claim I which has referred to *the deceased estates in the will which has been previously probated as the basis of her claim is a probate cause or matter* under the definition. Therefore the plaintiff's application is a probate action and the provisions of O 72 r 2 of the Rules of Court 2012 read together with s 34 of the Probate and Administration Act 1959 applies. (Emphasis added.)

[16] The case of *Neoh Ah Yan v Ong Leng Choo & Anor* [2008] 7 MLJ 151; [2007] 10 CLJ 410 supported the defendant's argument. In this case, where the suit is essentially an action for the grant of letters of administration to a person, that is, *the plaintiff to be joined with the existing co-administrators* to administer the estate of the late Neoh Eng Hong was held to be more than merely an application to amend the letters of administration therefore, the application should have been commenced by way of a writ action, as clearly provided for under O 72 r 2(1) of the RHC. (Emphasis added.)

[17] The plaintiff in this action claims that the she was not given her due beneficiary share under the will. It is not in dispute that the entire proceeding would circle around the question whether *there was due and proper administration of the estate in accordance to the will of the deceased*, and the end result is *whether there is sufficient cause to appoint an additional executor* given that the administration and distribution of the assets have not been fully and properly carried out (as per the agreed issues to be tried). (Emphasis added.)

[18] It cannot be disputed that the plaintiff's action is a contentious proceeding. This can be seen from the plaintiff's submission on the due and proper administration of the estate. In the present dispute it was contended as follows:

(a) the duty of the defendant as executor and trustee of the estate that after having proved the will and extracted the grant of probate, to collect all assets, and to convert these assets into money, and after having made payments for 'outgoings' as defined in cl 4 of the will to distribute the residue among the beneficiaries as stated in cl 5 of the will;

(b) it is also the defendant's duty to distribute the residuals assets under 'cash and stocks' of the deceased assets according to the intention of the deceased as expressed in the will. It is not for the defendant, in collusion with some other beneficiaries, to decide whether or not to pursue to collect those assets within and or outside Malaysia for whatever reason for distribution to the beneficiaries as expressed by the deceased in the will;

(c) the plaintiff as trustee of the deceased estate the defendant must bank in all money that was derived from the assets listed in the will whether it was cash lifted from fixed deposits accounts or from proceeds of sales of assets or income earned and interest accrued thereof from the assets into the estate account;

(d) it was also the duties of defendant as executor/trustee to render a clear and accurate periodic account to keep the beneficiaries informed on the status and affairs of the estate;

(e) from the plaintiff's point of view, it is not the law that the executor/trustee has to seek the consent of majority of the beneficiaries on decision whether to recall assets and/or to convert these assets into cash/money and after having paid the expenses for the legacies, to distribute the residue cash/money to the beneficiaries accordingly as expressed in the will. Conversely it is the law that the executor/trustee *is required to administerand distribute all the assets according to the intention of the deceased as expressed in the will*, as provided under s 68(7) of the Probate and Administration Act 1956 which states as follows:

> Where the deceased leaves a Will this Section has effect subject to the Will.

(f) in the case of *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177 at p 184 (MLJ); [2002] 6 CLJ 152 p 156 (CLJ), the High Court held:

> The principal duties of an executor are to get in the assets of the deceased to pay his debts, to pay the legacies given in the Will and to distribute the assets. The duties of the Executor are set out in p 68 of the Probate and Administration Act 1959.

(g) in the book entitled *The Law and Wills Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu, the learned author had observed the following:

> The duties of the executor are to carry out the funeral rites of the deceased in accordance with the terms of the Will; to prove the Will; to collect the estate and as necessary to convert it into money; to pay the testator's debts in the proper order; to pay the legacies and to distribute the residue among the persons entitled.

[19] On the other hand, the defendant submitted that the defendant has carried out his duty as administrator of the deceased estates. The dispute arose because the defendant's actions as administrator were questioned by the plaintiff for his purported failure to conduct his duties as an administrator with regards to the estate. The defendant's arguments are as follows:

(a) during trial, the defendant was questioned with regards to the Tatoo estate which was part of the will. The defendant submitted that all the other beneficiaries had agreed that there was nothing to claim from the Tatoo Estate as it was only an entity formed for tax purposes;

(b) the plaintiff had also made allegations that the defendant had failed to administer the cash and stocks in India. The defendant had at all times clearly stated that it was difficult for anyone to go to India to get any information on the cash and stocks;

(c) the plaintiff had made allegations that the probate obtained here in Kuala Lumpur High Court would be accepted in the Calcutta High Court. However DW1 had testified that the late Dr Ajoy Kumar Roy

Choudhuri had tried to do so but failed. This is due to the fact that the Calcutta High Court does not recognise the Kuala Lumpur High Court probate and a fresh probate had to be applied;

(d) in this respect the defendant submitted that he had done all he could to try and settle matters in India. Prior to the trial, the defendant had offered to give a PA to plaintiff to deal with the cash and stocks in India; however the plaintiff had refused to accept the opportunity. The plaintiff themselves should know the degree of difficulty it takes to deal with the parties in India;

(e) the defendant also as administrator has continued his duty in trying to sort out the shares in Singapore. It is important to note that the other beneficiaries had agreed to not yet sell the shares in Singapore;

(f) as mentioned above, the brokerage firm handling the Singapore Shares had gone into liquidation. The DW1 had appointed a new firm and is now in the process of obtaining the seal of the probate at the Singapore High Court as the Singapore shares are still in the name of the deceased;

(g) once the shares have been administered, the plaintiff would then definitely receive her portion (one eight) as per the will. The plaintiff has failed to establish as to where the defendant has failed in fulfilling his duties. As per the accountants report, it is clear that there is still money owed to all the beneficiaries from the estate;

(h) the plaintiff had sought for a relief of damages in this suit against the defendant. It was contended by the defendant that during the trial and the documents tendered, there was no proof provided to this court to show that any damage has been suffered to the plaintiff (see the case of *Sindora Furniture Sdn Bhd v Top-Range Product (M) Sdn Bhd* [2010] MLJU 1735; [2010] 1 LNS 881); and

(i) finally it was contended by the defendant that the other beneficiaries have not taken any action against the defendant as all parties have an understanding and the defendant has and always been fulfilling his duty as administrator.

[20] In dealing with this present dispute, the Court of Appeal case of *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81 has held that the real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries and the test is a strictly objective test.

[21] Therefore, this suit is in its essence a 'PROBATE ACTION' as defined under O 72 r 1(2) of the Rules of Court 2012. As such there is requirement for the Plaintiff to commence this proceeding by way of O 72 r 2 of the Rules of Court 2012. A probate action must be begun by writ, and the writ must be issued out of the registry as provided under r 2(1). The word 'must' denotes that it is mandatory for the action to be begun by way of a writ action (see *Neoh Ah Yan v Ong Leng Choo & Anor* [2007] 7 MLJ 151; [2007] 10 CLJ 410).

[22] Accordingly this court rules in favour of the preliminary issue raised by the defendant and plaintiff's action is hereby dismissed 'in limine' for having failed to use the proper procedure in bringing her action.

TRIABLE ISSUES

[23] For the sake of completeness and assuming this is a probate action correctly brought by the plaintiff, whether in the plaintiff's action there was due and proper administration of the estate in accordance to the will of the deceased, and whether the plaintiff was given her due beneficiary share under the will.

[24] The parties to the dispute had accordingly agreed the issues to be determined before this court are as follows:

(a) whether the sum of *RM340,000* already paid to the plaintiff represents the full and final beneficiary shares which the plaintiff was entitled under the will;

(b) whether the defendant had *fully and properly administered* the beneficiary shares held under 'cash and stocks' assets of the deceased estate;

(c) whether there was *due and proper administration* of the estate; and

(d) whether *it is necessary to appoint an additional executor* given that the administration and distribution of the assets have not been fully and properly carried out. (Emphasis added.)

[25] The plaintiff has pleaded the following reliefs in her statement of claim:

(a) for an investigation to be conducted over the assets of the deceased and an accurate accounts be given to the court;

(b) the assets that are in relation to the plaintiff to be administered and from the administration of those assets, the interest collected to be given to the plaintiff as per the will;

(c) an additional administrator to be appointed by this court;

(d) cost;

(e) damages to assessed;

(f) interest at the rate of 8% till the date of full payment; and

(g) other reliefs in which the court sees fit.

[26] However, the defendant seeks for this court to dismiss this suit and award cost to the defendant and any other reliefs appropriate.

[27] This court is fully aware that the law on duties of executor/administer as representative of the deceased is set out in s 68 of the Probate and Administration Act 1959 and in the case of *Ligar Fernandez v Eric Claude Cooke* [2002] 5 MLJ 177; [2002] 6 CLJ 152 (see also *The Law and Wills Probate Administration and Succession in Malaysia and Singapore* by Mahinder Singh Sidhu).

THE FIRST ISSUE OF THE PLAINTIFF'S CASE

[28] Whether the sum of RM340,000 already paid to the plaintiff represents the full and final beneficiary shares which the plaintiff was entitled under the will.

[29] The plaintiff was informed on 2 March 2005 (p 28 Part A) by the defendant that the RM340,000 payment represent the full and final of her beneficiary share under the will of the deceased estate.

[30] Vide the solicitor's letter dated 18 March 2005 (at p 29 Part A) in para 2(e) the plaintiff was told there was no trust created in her favour save as expressed in the will.

[31] The evidences during trial would reveal that the defendant and DW2 have admitted the following facts:

(a) that the plaintiff had been given RM340,000 being her share of the proceeds from the estate (question 39 witness statement).

(b) that the payment cover the plaintiff's portion under 'Nilai Bersih' which meant 'Net Value' (question 42 witness statement).

(c) that the 'Nilai Bersih' refers to money uplifted from the fixed deposit accounts with the bank (under cross-examination).

(d) the defendant had confirmed to have cashed out RM2,837,198.38 for distribution from 'cash and stock' at p 31, Part B (referred to as N2 Account) (question 38 witness statement).

(e) both the defendant and DW2 had conceded during cross-examination that from the said sum of RM2,837,198.38 as reported in N2 account and after deducting for 'outgoing expenses', the balance sum would be available for distribution on end June 2004 to the respective beneficiary their due share under the will (during cross-examination).

(f) 'outgoing expenses' was defined in cl 4 of the will and they are for payment towards the deceased medical, funeral and testamentary expenses debts and estate duties payable.

(g) DW2 had in his cross-examination conceded in reference to p 5, encl 'G', that the testamentary expenses are for expenses as follows:

(i) Accountant fee's	RM14,800.00
(ii) Execution of will expenses	RM15,445.97
(iii) Will settlement fee to Ms Zubeda & Armajeet	RM1,200.00
Total testamentary expenses:	RM31,445.97

(h) DW2 had further conceded that all other expenses were not testamentary expenses. The medical and funeral expenses were stated at p 33, p 34 and p 36 Part B, and they were as follows:

(i) Dr Shipra Nag	RM5,536.14
(ii) Dr Rita Roy	RM5,578.19
(iii) Mr Deb Bratta Das Gupta	RM7,165.28
Total expenses for medical funeral:	RM19,279.42

(i) adding up the total testamentary expenses and medical and funeral expenses, the 'Outgoing Expenses' total to a sum of RM50,725.39.

(j) from RM2,837,198.38 (N2) less deduction for 'outgoing expenses' RM50,725.39 the balance sum available for distribution was RM2,786,472.97; computation as follows:

Receipt (N2, page 31 Part B) Less:	RM2,837,198.38
'Outgoings Expenses'	RM50,725.99
Balance available:	RM2,786,472.97

(k) the plaintiff 1/8 share on the balance available would amount to RM348,309.12. As the defendant had to date only paid the plaintiff RM340,000 as her portion of her beneficiary share there was a balance sum of RM8,309 due to her as her beneficiary share from the money lifted from the fixed deposit accounts ('N2 account').

[32] The plaintiff submitted that any deductions by the defendant for expenses which were not for 'the outgoings' would reduce the amount available for distribution and had not represented the correct amount of beneficiary share which the plaintiff was entitled under the will.

[33] From the admitted facts it is not disputed that there was a balance sum of RM8,309 due to the plaintiff.

[34] From the admitted facts, I agree that there are still assets under cash and stocks which had not been administered. Among the assets not administered were shares stocks at Bursa Malaysia and shares stocks listed in the Singapore Stock Exchange in List B item (4) at p 7 Part A.

[35] The defendant had conceded as at end June 2005 the unsold share stocks in Malaysia were those listed at p 16 Part B of common bundles, valued at RM197,404.55 on that material date.

[36] The defendant had at p 118 of Bundle B1 provided an updated list of the estate unsold shares stock in Bursa Malaysia as at 17 February 2014.

[37] The plaintiff submitted that based on the market stock prices as at 20 March 2014 the total value of these unsold shares was valued at RM293,227.16 (referred to P15) on 20 March 2014.

[38] At all material time there was no evidence the defendant had included the cost price of these unsold shares as part of the RM340,000 that was distributed to the plaintiff. This was proven when the defendant had stated affirmatively that RM340,000 was the plaintiff share portion from 'Nilai Bersih' which refers to money lifted from the fixed deposit account with the bank. Accordingly the plaintiff submits she is entitled to 1/8 share from the proceeds of sales of these unsold shares stocks, and not 1/8 shares from profits of these shares, computed as total sales proceeds less cost of shares.

[39] In p 35 Part B, the plaintiff states that it was cogent proof the plaintiff is entitled to interests earned from the fixed deposit for the children's share that had been placed under fixed deposit at Bumiputra Commence Bank.

[40] The plaintiff had adduced evidence that pursuant to the accountant's report for period from 27 March 1999 to 31 December 2012 dated 19 February 2014 (encl 'G'), at p 9, the accountant had reported interest earned and accrued to the children fixed deposit account for sum of RM117,568.36 were uplifted in May 2005.

[41] From the evidences revealed during trial, the defendant has admitted the following facts:

(a) the plaintiff is entitled to receive RM58,784.18 being her share to 50% of the interest accrued under the will. The defendant had further stated

A he has not paid the said sum of money to the plaintiff because the plaintiff had not gone to see him, but the money is available to be paid to her (during cross-examination);

(b) the said sum of money accrued from interest earned was not bank into the estate account and had instead been banked into his personal account. In banking the money into his personal account, the defendant had failed to neither account nor distribute the interests earned to the plaintiff accordingly (during cross-examination);

(c) at p 8, encl G, it was reported that on 17 January 2012, the defendant had made payment for sum of RM35,000 for the 'Children's distribution';

(d) the defendant had confirmed this payment was made only to Debayan Das Gupta, being the brother of the plaintiff and the other children as defined in the will. It was further confirmed by the defendant the RM35,000 paid to Debayan Das Gupta were on top of his beneficiary sum of RM340,000 already paid to him somewhere in 2005 (during cross-examination); and

(e) the plaintiff is entitled to equal share with her brother Debayan Das Gupta to the assets defined as 'cash and stocks' under the will and have to date not paid the plaintiff RM35,000, the sum which was paid to the other children Debayan Das Gupta on 17 January 2012 because the plaintiff had not gone to see him.

[42] The plaintiff submitted that the same sum was equally due to her as her beneficiary share under the will, and the defendant had with held the payment of the said sum of RM35,000 due and owing to her. The reason for not paying the plaintiff the said money is clearly untenable as the defendant could always made such payment through the plaintiff's solicitors as he did in previous payments to the plaintiff.

[43] From the admitted facts, I fully agree with the plaintiff that they had proved on balance of probability, and supported by cogent evidence, that the said sum of RM340,000 already paid to her does not represent the full and final sum of her beneficiary shares which she was entitled under the will. Just on a cursory look, there was a sum of RM293,600 which may be recoverable from proceeds of sales of share stocks at Bursa Malaysia and her 1/8 share would amount to RM36,625. There are also share stocks with Singapore Stock Exchange which is recoverable in money to which the plaintiff was also entitled to her due beneficiary share.

SECOND ISSUE OF THE PLAINTIFF'S CASE

[44] Whether the defendant had fully or properly administered the beneficiary shares held under 'cash and stocks'.

[45] The evidences during trial would reveal the following facts:

(a) the first accountant's report had confirmed the stocks and shares at p 16 Part B estimated at about RM197,404.56 had not been sold and converted into cash for distribution;

(b) the defendant had stated the unsold shares had earned dividends, but there was no record in the accountant's report on dividends earned by these unsold shares stocks for period from July 2000 (question 27 witness statement);

(c) to the contrary in his report at p 7, encl 'G', DW2 had reported a sum of RM56,049.20 being dividend received had not been banked in;

(d) DW2 had conceded these were dividends accrued from unsold shares in Malaysia still in the possession of the estate (under cross-examination); and

(e) the defendant had conceded he had to date yet to sell the share stocks listed in Item 4 of List B at p 7, Part A, on grounds that the stock brokerage firm was undergoing liquidation, and that he could not administered those assets for reason that he was barred from leaving the country (question 20 witness statement).

[46] The plaintiff contended the shares stocks listed in Singapore Stock Exchange could be handled and executed through the local stock brokerage firm without the defendant having to be in Singapore.

[47] The plaintiff contended that a local brokerage firm, if appointed, could ascertain the status and value of the said shares with the authorities of the Singapore Stock Exchange. As such the excuse given for his failure to recover these shares for distribution is clearly untenable.

[48] In respect of these shares with the authorities of the Singapore Stock Exchange, the defendant conceded that the defendant had appointed another security firm to follow up with action to ascertain the quantity of shares listed under Item 4 Part A, and this action was only taken one month ago, that is somewhere around February 2014 (during cross-examination).

[49] With regard to the fixed deposits held in the Account No 15205 with the United Bank of India (Calcutta) and Account No 120363 and No 23046

with the United Commercial Bank (Calcutta), the defendant had conceded in his cross-examination that the last sentence at p 75 of Part A to have stated 'he remember Dr Ajoy mentioned of one account in India had RS400,00'.

[50] The plaintiff submitted that the evidence by the defendant is in conflict to his earlier reason for not being able to administer the share stocks in Singapore. lt is thus premature for the defendant to conclude the stocks and shares in India is worthless, when he had not ascertain from the respective bank the amount of money held in the three bank accounts. No evidence was adduced to prove the defendant had appointed any solicitors to prove the will to obtain a grant of probate from any High Court in India. In the circumstance, the defendant had failed to carry his duty as executor under the will.

[51] The plaintiff contends that the Kisan Vikas Patara bonds are financial documents which are redeemable in cash upon the maturity date.

[52] At p 44 Part B. These 5 1/2 years bond were issued on 20 January 1993 and 28 September 1995, as such, these bonds may be redeemed for cash during the accounting period before June 2004.

[53] No evidence what so ever had been adduced that the issuer of these bonds had defaulted in the redemption of the Kisan Vikas Patara bonds. As such, the defendant's contention in question 36 witness statement (A) that these bonds are of no value is baseless.

[54] The defendant had also failed to account for the assets in the deceased accounts with Hong Kong Bank Malaysia listed in item 7(iii) of List B (at p 7 of Part A). Other than ascertaining the accounts were closed on 18 April 2000, no evidence was produced to prove on its financial status, or that there was no money balanced in the two accounts on 27 March 1999, the date probate was granted, or the financial position of the accounts prior to its closure.

[55] At p 12 of encl 'G' the accountant had reported there was no evidence of banking in of money uplifted from Account No 1408–1194546–52.

[56] DW2 had in his report (encl 'G') further discovered that between 2004–2012 the defendant had disposed of some shares for a total sum of RM43,783.44, and had in p 7 encl 'G' reported the said proceeds from the disposal of these shares were not banked in into the estate account.

[57] DW2 had further confirmed the defendant had used the estate money to purchase two new share counters as shown at p 6 encl 'G', which was inconsistent to his duty as executor of the deceased estate.

[58] The defendant had conceded the payment made on 17 January 2012 for sum of RM35,000 for distribution to the children as show at p 7 encl 'G' was only paid to Debayan Das Gupta, and the same was not made to the plaintiff for her equal share as expressed in the will of the deceased.

[59] Based on the aforesaid facts and my finding is that the defendant had failed to fully and/or properly administer the beneficiary shares of the estate under 'cash and stocks' to which the plaintiff was entitled to her due share as beneficiary under the will.

THIRD ISSUE OF THE PLAINTIFF'S CASE

[60] Whether there was due and proper administration of the estate.

(a) the defendant had charged to the 'cash and stocks' legacy the expenditures that do not come within the ambit of 'outgoings' as defined in the will.

[61] Paragraph 4 of the will (at p 21 Part A) provides that payments for 'the outgoings' shall be made from any cash or money the deceased may die possessed of (including those lying to her credit in accounts maintained by her with any banks or financial institutions, wherever situated).

[62] DW2 had during his cross-examination conceded that testamentary expenses were for expenses including legal fees incurred to obtain and extract the probate from the High Court and accountant fees for preparation of account for the estate.

[63] The plaintiff counsel had referred DW2 to p 5 encl 'G' and DW2 had agreed when it was put to him that the testamentary expenses here were for accountant fees, the execution of will expenses and will settlement fee to Ms Zubeda & Armajeet, and all the other expenses does not come within the ambit of testamentary expenses.

[64] As such the plaintiff contends that the expenditure for expenses in the repair of estate assets, car repair, renovation expenses and maintenance of the estate were not expenditures that come within the definition of 'the outgoings' as defined in para 4 of the said will.

[65] In deducting this expenditure which was not 'the outgoings' from cash and money derived from the 'cash and stocks' assets of the estate, the defendant had acted contrary to para 4 of the said will and had committed a breach of trust in the administration of the estate.

[66] Paragraph 13 of the will (at p 25 Part A) states as follows:

> The trustees shall in addition to such powers vested in them by law, be entitled to apply the income of my estate to the maintenance thereof and to distribute any balance of the same to the beneficiaries if this my will in the proportions as set out herein (depending on the source of the income) PROVIDED that any income or capital of my estate attached to the shares beneficially owned by the Children until the respective Vesting Dates shall be applied towards their benefit and advancement; including their education or marriage; or in the absence and/or prematurity of the requirement or such application, to be invested in such manner as my trustees deem fit until such time as the Children or any one or more of them shall be entitled to absolute rights to the same in the manner set out above.

[67] Accordingly the trustees were not permitted to apply the income or capital attached to shares beneficially owned by the children to the maintenance of the estate.

[68] At p 29 Part B, the Accountant's Report had shown explicitly the trustees/administrator had charged the expenditures on all expenses on the maintenance of the estate to dividend income derived from shares that was attached to shares beneficially owned by the children in conflict to para 13 of the will; the conduct of which was again a breach of trust in the administration of the estate.

[69] The defendant had in the expenditures of the estate included the payment for sum of RM86,958.21 being the executor's fee payable to the defendant and Dr Ajoy Kumar Roy Chondhuri.

[70] At p 39 and p 40 Part B, the accountant had reported the computation of the said executor's fee and had in notes (1) stated 'Executor's fee has been provided in accordance with the Official Administrator (Fees) Regulations 1972 of the Probate and Administration Act 1959 ('Regulations 1972').'

[71] I agree on submission that Regulations 1972 was applicable to official administrator only, and pursuant to para 3 of the said Regulations, 'the fees mentioned in the Schedule to these Regulations shall be paid in respect of the duties referred to therein'.

[72] The plaintiff contends the fees in the schedule of the said Regulations 1972 is not applicable the defendant who had accepted his appointment

willingly as executor/trustees under the will. In the circumstance the defendant's action in charging the executors fees as provided for the official administrators under Regulations 1972 of the Probate and Administration Act 1959 was misplaced and without the authorisation of the High Court. A

[73] Therefore, from the evidence adduced the executor's fee which the defendant had charged to the estate against the money from the dividend income was improper and constituted a breach of trust. B

[74] The defendant had conceded there was no provision for remuneration of executors in the will; and no application was made to the High Court for commissions on the value of assets to be paid to the executors in the administration of the deceased estate. C

[75] In *Subbiah Sundaravalli Achi v Karuppiah Chettiar & Anor* [1968] 1 MLJ 120, at p 122 (please refer to p 45 to p 48 of the BOA) the learned judge Chang Min Tat J (as he then was) had held: D

> ... the general rule is that a trustee cannot make a profit from his trust and it follows that trustees and executors are generally entitled to no allowance for their time and trouble (see *Robinson v Pett* (1)). In the absence of any provisions in the will, apart from the executors' remuneration, and in the absence of any agreement with the beneficiaries and without there being any order of court or statutory provisions allowing or justifying the continuance of the remuneration drawn by the first respondent qua employee, he must now be ordered to refund what he had drawn in excess of his testamentary allowance. It may be harsh on him but if the testator had desired to give him a greater remuneration, he would not have fixed the sum. Since he had done so, he must have considered it to be sufficient and proper remuneration for his executors. If his executors did not agree they were entitled to decline the trust but having accepted it, they must be taken to have agreed to do so at the remuneration offered. E F

G

[76] Pursuant to s 43 of the Probate and Administration Act 1959 (refer to pp 75–86 of the BOA) which provides as follows:

> (1) The Court may in its own discretion allow the executors or administrators a commission not exceeding five per centum on the value of the assets collected by them, but in the allowance or disallowance of the commission the Court shall be guided by its approval or otherwise of their conduct in the administration of the estate. H
>
> (2) The Registrar may in the course of the taking of the administration accounts of executors or administrators exercise the powers conferred on the Court by subsection (1). I

[77] In the case *Fong Ah Tai & Ors v Fong Yoon Heng & Anor* Dalam Mahkamah Tinggi Malaya Ipoh, Guaman Sivil No 22–354 Tahun 1999 (refer to pp 49–52 of the BOA) the High Court has held:

> Reading the above provision, it is trite that the power of awarding commission to the executor lies solely at the discretion of the court after taking into account the conduct of the executor in administering the estate. (*Rachael Mei Ling Ong & Anor v Dato' Bruno Henry Almeida (as trustee of the estate of Ong Soon Hoe @ Patrick Ong)* [1998] 6 MLJ 258; [1998] 3 CLJ 71; [1998] 1 AMR 600). The executor cannot on his own simply charge to the account of the estate in claiming for the commission allowed under the Act. The defendants in the instant case, must make an application to the court under the said provision and show to this court their conduct in administering the estate.

(b) the defendant had not prepared any periodic accounts in relations to assets defined as 'cash and stocks' to which the plaintiff has a beneficiary interest.

[78] The plaintiff had repeatedly requested for an account in relation to the assets of 'cash and stocks' assets, and was only given the accountant's report (p 23 of p 42, Part B) for the whole estate of the deceased in May 2005.

[79] Until 20 February 2014 no account was prepared in respect of the assets under 'cash and stocks' to which the plaintiff has a beneficiary interest in the said assets.

[80] It is not disputed up to the hearing dated on 21 February 2014, the defendant had failed to render the periodic accounts which the plaintiff had repeatedly requested for, and the conduct of the defendant showed an obvious reluctance to render such an account.

[81] In *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors* [1998] 4 MLJ 268; [1998] 4 CLJ 81 (refer to pp 17–30 of the BOA) the Court of Appeal had held:

> The duty to render account is one of the basic duties off all executors or trustees. By the terms of the deceased Will, the issue of accounts was all important since the residue for distribution could be derived at only after deductions of debts and expenses had been made. Without the accounts being rendered the beneficiaries would not have any means of knowing whether the estate was being the administered properly.

[82] It is noted that as at 20 February 2014 other than the accountant's report for period between February 1998–June 2004, no accounts pertaining to 'cash and stocks' of the deceased estate had been rendered. A

[83] The accountants report dated 19 February 2014 referred to as encl 'G', on the account for assets defined as 'cash and stocks', was only handed over to the plaintiff's solicitors and to the court on 21 February 2014. B

[84] The plaintiff contended this report encl 'G' is not an independent report and was not impartial as the accountant DW2 based on the following reasons: C

(a) that this report was made on the instruction and information and documents given to him by the defendant, and it was not an audited report;

(b) DW2 had during his cross-examination confirmed the report was not conducted based on the agreed proposed term of his appointment as directed by the court but based only on the instructions of the defendant; D

(c) DW2 had admitted that he was given instruction by the defendant on 20 December 2014 in the court premises to carry out the accountant's report based on information and documents given to him and not to ask any question, and had conceded under cross-examination he was in no position to know whether the defendant had withheld or suppressed the relevant documents from being given to him; E F

(d) DW2 had admitted to have told the plaintiff's counsel on 21 February 2014 that he had to stay late on that morning to complete the accounting report, and had conceded the report could not be ready before 21 February 2014. This was in clear contrast to the report which was dated 19 February 2014 which proved the defendant had made a false declaration at p 2 of encl 'G'; and G

(e) DW2 had during cross-examination agreed that based on N2 accounts at p 31 Part B of common bundle and after deducting expenses for 'outgoings' the balance sum were available for distribution as beneficiary shares to the respective beneficiaries. Based on the computation the plaintiff was entitled to RM348,309 being her portion of beneficiary shares and out of which she was paid RM340,000. DW2 had conceded the account at N2 was not inclusive of interest accrued to the children from the children's fixed deposit account. H I

[85] The plaintiff states that the accounting report at p 9 of encl 'G' the total sum available for distribution as at 27 March 1999 is diametrically different to accountant's report N2 at p 31 Part B.

[86] The accounting report at p 9 encl 'G' shows the computation on payment of RM340,000 to the plaintiff had included payment of interest accrued to children fixed deposit accounts which was in conflict and inconsistent to accounts report N2 and to report at p 8 encl 'G' and was contrary to facts and evidence adduced before this court.

(a) facts

(i) at question 38 witness statement (A) the defendant had testified as at June 2004 the total amount of money cash-in under the 'cash and stocks' assets total RM2,837,198.38 (as reported in N2 account at p 31 Part B). These were money uplifted from the fixed deposit and saving accounts plus proceeds from sales of quoted shares and dividends/incomes received as at May 2000;

(ii) after deducting for 'outgoing expenses' the balanced sum of RM2,786,472.97 were available for distribution to the beneficiaries;

(iii) in question 1 and question 2 witness statement (B), the defendant had confirmed to have distributed by end 2000 to the beneficiaries their respective shares from money reported in N2 Account (refer p 28 Part B);

(iv) the children's shares at 25% of RM2,786,472.97 was RM696,618.22 of which 50% was the plaintiff's shares which total RM348,309.11;

(v) of the children's total shares of RM696,618.22, the defendant had placed RM583,603.77 under fixed deposit at Bumiputra Commerce Bank and interest accrued on the said fixed deposit is to be distributed to the said children (p 35 Part B);

(vi) as such, the principal sum of RM583,603.77 as shown at p 9 encl 'G' therefore did not represent the full beneficiary shares of the children's portion which correct amount was RM696,618.22. The difference sum of (RM696,618.22 – RM583,603.77) RM113,014.45 were withheld by the defendant and not placed under the children fixed deposit account, nor does it include the cost of unsold shares listed at p 16 Part B; and

(vii) at all material time N2 account was not inclusive of interest earned and accrued from the children's fixed deposit account.

(b) evidence

(viii) up to 21 February 2014 the defendant had maintained the position that the children's share was kept in a current account and there is no issue of interest accrued. Accordingly for easy reference the plaintiff reproduced the verbatim in question 20 of the defendant's witness statement (B) as below:

Q20: Do you have any further amendments to the Report?

A : Yes, I wish to amend at p 31 of part B which is the statement of Receipts marked as N2. I want to amend the total sum for the 'Dividend Income from 'RM 192,101.39' to RM 47,323.89' and to amend the total sum for the 'Proceeds from sale of quoted shares' from RM350,749.21 to 'RM495,526.71'.

I would like to emphasise that the total receipts as stated at p 31 and marked as N2 does not change and maintained for a sum of RM 2,837,198.38.

I also would like to amend the Report at p 35 of part B which is the statement of advances to children of Mr Deb Datta Das Gupta marked as N6. I wish to delete the 'Note' of the statement which says 'Children's share have been placed under fixed deposit at Bumiputra Commerce Bank Berhad, Jalan Tun Perak branch. Interest accrued to date on the said fixed deposit is to be calculated before distribution to the said children.'

I note that may have been some miscommunication between me and the Accountants preparing the report. There was no fixed deposit account maintained for the children's share. It was actually kept in a current account. Therefore, there is no issue of interest accrued for the children as this is a non interest bearing account.

[87] The plaintiff states that contrary to his evidence given in question 20 witness statement (B), the accountants report at p 9 encl 'G' had stated the distribution of funds assets in 1999 and 2000 were kept in three fixed deposit at CIMB Bank in the executors name and were uplifted in 2005.

[88] The report at p 9 encl 'G' reported the interest accrued to a total sum of RM117,568.36, and together with the principal sum of RM583,603.77, the total sum due to the children was RM701,172.13. It was reported based on this computation the sum of RM340,000 already paid to the children were their due portion of beneficiary shares inclusive of the interest accrued on the children fixed deposit accounts with a balance of RM21,172.13 due and owing to the children.

[89] I agree with the plaintiff that the accountant report at p 9 encl 'G' had contradicted the defendant evidence which he had to date admitted he has not paid any accrued interest from children fixed deposit to the plaintiff.

[90] Therefore, DW2 had erred in the accounts report at p 9 encl 'G' as the defendant had conceded during cross-examination the sum of RM340,000 paid to the plaintiff represent her portion of 'Nilai Bersih' being the money uplifted from the fixed deposit accounts at banks (N2 account).

[91] It was further in conflict to the defendant evidence where he had on 3 March 2014, testified the plaintiff was entitled to the interest accrued on the children fixed deposit accounts but he has not paid her the said money because the plaintiff had not gone to see him.

[92] Be that as it may, the defendant had not placed the full sum of the children's entitlement from N2 account as the principal sum in the fixed deposit account; the difference of RM113,014.45 were withheld by the defendant. The plaintiff states that this sum (RM113,014.45) plus balance of RM21,172.13 shown at p 9 encl 'G' would represent the amount due and owing to the children on May 2005; that is , RM134,186.99, and the sum due and owing to plaintiff then was for sum of RM67,093.29.

[93] The plaintiff submits that the accounting report in the computation of payment to the plaintiff at p 9 encl 'G' was clearly a 'creative' accounting report which DW2 had made at the directions of the defendant and was baseless when the defendant had in his cross-examination admitted he has not paid the plaintiff the interest accrued from the children fixed deposit accounts.

[94] Though the accountant's report (encl 'G') for assets defined as 'cash and stock' was only made available to the plaintiff on 21 February 2014, even then DW2 had conceded the unaudited account is not sufficient to render it as a true and fair account of the estate. In the circumstance, as at to date the defendant had failed to render to the plaintiff a clear and accurate account on the 'cash and stocks' assets of the estate.

[95] In *Gan Chiew Heang & Ors v Universal Trustee (M) Bhd & Anor* [2011] MLJU 1286; [2011] 10 CLJ 213 (refer to pp 31–44 of the BOA), the learned judge held:

> The duties of executor/trustee is to render a clear and accurate account, for it is only through proper and accurate account that the beneficiaries have the means of knowing whether the estate is being properly administered.

[96] My finding is that the accountant DW2 had based his report solely on information made available to him by the defendant; it is highly prejudicial to the plaintiff for the court to rely on DW2 accounts forwarded to the court without the benefit of an audited account. As such the accountant's report in encl 'G' must be taken with caution.

[97] DW2 had conceded he has not stated the unaudited accounts encl 'G' was a true and fair account of the estate defined as 'cash and stocks' of the deceased estate, and had instead stated that except for certain errors discovered and corrected, the first accountant report dated 14 December 2004 represents a true and fair accounts of the estate. That being the case, where there is a conflict between DW2 report (encl 'G') with the first accountant report (marked as P3), P3 would prevail over encl 'G'.

[98] In P3 report there was not a single iota of evidence to show the defendant had paid the original costs of unsold shares (at p 16 Part B) into the total fund to account for the payment of RM340,000 as the portion of the plaintiff's share in the 'Nilai Bersih'.

[99] To the contrary, it is inconceivable as advanced by DW2 in p 8 encl 'G', that the original cost of unsold shares would account for part of the money available for distribution when the said shares have remained unsold and no evidence what so ever was adduced to support his contention.

[100] It is indeed pertinent to note that the defendant had not brought up this issue in his pleading. It is trite law that parties are bound by its pleading (see *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 and *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retmanan* [2010] 7 MLJ 355.

[101] The defendant had in not providing the periodic account to the plaintiff, kept the plaintiff from knowing the status of the assets to which she had a beneficiary interest; and in the light of the expenses which was disbursed contrary to the will, and money received and not banked in to the estate account, there was clear evidence that there was lack of due and proper administration of the estate in relations to the assets held under 'cash and stocks' to which the plaintiff has a beneficiary interest.

FOURTH ISSUE OF THE PLAINTIFF'S CASE

[102] Whether it is necessary to appoint an addition executor given that the death of one of the executors and that the administration and distribution of the assets have not been fully and properly carried out.

[103] The plaintiff had in her pleading prays that an addition administrator be appointed by the court to administer the balance assets which to date has not been fully administered by the defendant after 15 year since the probate was granted.

[104] The plaintiff concedes that the appointment of an additional administrator would tantamount to an amendment to the existing probate already been granted and extracted by the defendant.

[105] Section 34 of the Probate and Administration Act 1959 states as follows:

> Any probate or letters of administration may be revoked or amended for any sufficient cause.

[106] In *Tan Khay Seng v Tan Kay Choon & Anor* [1990] 1 MLJ 51 (refer to pp 53–56 of the BOA), the learned judge Siti Norma Yaacob J (as she then was) held:

> Sufficient cause would be the undue and improper administration of the estate in total disregard of the interests of the beneficiaries.

[107] In *Damayanti Kantilal Doshi & Ors v Jigarlal Kantilal Doshi & Ors*, the Court of Appeal held that the power to revoke a grant of probate is vested in the High Court and may be exercised if the court is satisfied that there is sufficient cause to do so. In spite of this power it cannot be gainsaid that we are sensitive that the courts generally would be slow to interfere with the express wishes of a testator. Nevertheless s 34 of the Act empowers the court to interfere if sufficient cause is shown. The real object which the court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto then the test of what is a sufficient cause is the due and proper administration of the estate and the interests of the beneficiaries. In the court's view, the test is strictly objective test.

WHETHER THERE WAS 'SUFFICIENT CAUSE' TO JUSTIFY THE COURT'S INTERFERENCE TO APPOINT AN ADDITIONAL ADMINISTRATOR TO ADMINISTER THE ESTATE.

[108] In *Damayanti Kantilal Doshi*'s case the court had held:

> ... the failure to ascertain the residue of the estate available for distribution after nearly four years of executorship suggest strongly that the executors are not serious about discharging their basic duty which is to undertake the distribution and the winding up of the estate as soon as is practicable.

The court further states that:

> ... the failure to render accounts or periodic accounts the conduct of the appellants showed an obvious reluctance to render such accounts. This is in spite of four years of executorship. Up to the date of the trial no accounts had been rendered ...

The court further noted as follows:

> The duty to render accounts is one of the basic duties of all executors or trustees. It is the duty of personal representatives to keep clear and accurate accounts, and to be ready at all times to render such accounts when called upon to do so, see Halsbury's 4th Ed Vol 17 at para 1551 under 'Liability to Account'. By the terms of deceased's will the issue of accounts is all important since the residue for distribution is derived at only after deductions of debts and expenses have been made. Without the accounts being rendered periodically or at all (as in this case), the beneficiaries would not have any means of knowing whether the estate is being administered properly.

[109] In *Datin Melati Abdullah & Ors v Syed Hassan Syed Salim (No 2)* [1999] MLJU 420; [1999] 4 CLJ 21 (refer to pp 63–71 of the BOA), His Lordship Abdul Malik Ishak J had remarked:

> One must not forget the administrators exists for the benefit of the estate and its beneficiaries.

[110] Applying the aforesaid principle in *Damayanti Kantilai Doshi*, and the evidence before me, I can safely say as follows:

(a) that the defendant had not fully ascertain the residue of the estate available for distribution nor administered all the assets of the estate to fully distribute the assets of the estate to which the plaintiff is entitled under the will after fifteen years of executorships;

(b) the defendant had not fully paid to the plaintiff her due beneficiary shares from money lifted from fixed deposits as reflected in N2 account;

(c) the defendant had not distribute to the plaintiff RM35,000 being her equal beneficiary shares which said sum had been distributed to her brother on 17 January 2012;

(d) the defendant had failed to bank in money received in respect of the following:

  (i) dividends received from shares;

  (ii) proceeds from disposal of share stock; and

  (iii) interest accrued from the children fixed deposit.

(e) the defendant had failed to render accounts or periodic accounts which show an obvious reluctance of the defendant to render such an account.

(f) the defendant had acted to the detriment of the plaintiff in failing to expeditiously and diligently distribute all the assets of the estate under 'cash and stocks' and to render a proper account accordingly.

(g) the defendant had not been acting in the best interest of the plaintiff by ignoring the plaintiff's request for information and the plaintiff had been kept in the dark as to the affairs of the estate for the years; and

(h) the defendant was in breach of trust in not disbursing the interest accrued from the fixed deposit account for the children kept at the Bank of Commerce.

[111] The plaintiff had clearly established there was 'sufficient cause' to justify the court interference to appoint an additional administrator to administer the estate.

CONCLUSION

[112] In this case the plaintiff's claim has not been properly brought before this court in a probate action and has been dismissed in limine. Had it been properly brought before this court, the judgment will be in the plaintiff's favour on the followings orders:

(a) a declaration that the sum of RM340,000 already paid to plaintiff did not cover the plaintiff's portion under the 'Nilai Bersih'.

(b) a declaration that the plaintiff was entitled to proceeds from assets which has yet to be recovered and converted into cash for distribution.

(c) an order directing the defendant as follows:

(i) To pay the plaintiff within two weeks from date of this order:

(a) the balance sum of beneficiary shares due to the Plaintiff the distribution of cash as at 3 January 2000.	RM8,309
(b) interest accrued from children's fixed deposit account.	RM58,784.14
(c) the equal beneficiary sum been distributed to Debayan Das Gupta on 17 January 2012, the children under the will.	RM35,000
Total	RM102,093.14

(d) an order directing the defendant as follows:

(i) To sell all the unsold share stocks listed in Bursa Malaysia within one month from date of this order and to distribute 1/8 of the net sales proceeds of the money received to Plaintiff within two weeks thereof as her beneficiary shares.

(ii) (a) To provide the plaintiff within two months from date of this order an updated status on stocks and quantity of shares held by the estate at Singapore Stock Exchanges.

(b) To sell the said Singapore shares stocks within one month after the estate had ascertained the status of the shares and quantity thereof (as in part d (ii)(a)), and to distribute 1/8 of the net sales proceeds of money received to the plaintiff within two weeks thereafter as her beneficiary shares.

(e) To reimburse within two weeks from date of this order, to the 'cash and stocks' assets account, money not banked in:

(a) Dividends received from shares stocks	RM56,049.20
(b) Proceeds from disposal of shares between 2004–2012	RM43,783.44
Total reimbursement sum	RM99,832.64
(c) To repay the debts due and owing to the Estate (referred to at p 8 encl 'G').	RM223,747.33

(f) that all moneys taken in excess of the testamentary remuneration to be repaid by the defendant to the estate for distribution to the beneficiaries accordingly;

(g) that an additional administrator to be appointed to administer the balance assets under 'cash and stocks' that have not been administered to date on terms as follows:

(i) the plaintiff shall appoint an administrator to administer the assets defined as 'cash and stocks' of the deceased estate;

(ii) a new bank account to be open for the 'cash and stock' assets of the deceased estate to be administered by the 'new' administrator as trustee for the estate;

(iii) the defendant shall transfer all cash in respect of the 'cash and stocks' currently in his possession and/or held in the Estate Account No 408–1197064–05–3 maintained with the Commerce International Merchant Bank (CIMB) at the main branch in Kuala Lumpur;

(iv) the defendant shall transfer all assets related to 'cash and stocks' of the estate; namely shares, equities, bank accounts and whatsoever assets and wherever located currently in his possession within two weeks upon this application been granted by the court;

(v) the defendant shall provide a statement of account for all money transactions/movements relating to the 'cash and stocks' assets commencing from date of grant of probate (27 March 1999) up to present date;

(vi) the defendant shall forward to the new administrator all documents, books, accounts, files (including those in electronic form maintained in computers) of the estate;

(vii) the administrator shall be paid a retainer fee of RM5,000 plus 5% commission on assets converted to cash from the 'cash and stocks' assets of the estate;

(viii) the administrator shall appoint Messrs Thong & Assoc and/or some other accounting firms at her discretion, to conduct an audited account in relation to 'cash and stocks' assets of the estate;

(ix) the defendant shall forward a certified copy of the 'Grant of Probate' issued by the High Court in Kuala Lumpur duly affirmed by a 'Notary Public' to enable the said administrator to have the probate sealed by the High Court in Singapore and India respectively in order to facilitate the recovery of the assets in the respective country;

(x) the fees payable to the appointed accountants and the administrator shall be from money recovered from the 'cash and stocks' fund of the estate;

(xi) the administrator shall upon recovering all assets available convert it to cash and after making all payments arising for the administration of the 'cash and stocks' assets of deceased estate, distribute 1/8 share of the balanced cash to the plaintiff as her beneficiary share, and to refund the balance 7/8 share to the defendant for him to distribute the balance money to other beneficiaries under the will; and

(xii) the administrator shall direct the accountants to prepare a final account for the assets in relation to 'cash and stocks' of the estate when the said assets have been fully administered.

(h) the interest at 8% pa calculated on daily basis until full settlement; and

(i) cost of this proceedings. Parties has agreed to bear their own costs.

Plaintiff's action dismissed.

Reported by Kanesh sundrum